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No. 98-1573

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

FARMERS INSURANCE EXCHANGE

Petitioner,

v.

CHARLES THEODORE DENESHA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. The Case Involves Punitive Damages Awarded Under Missouri Law Which Petitioner Admits Meets Due Process Standards. Should the Petition be Denied Because Petitioner's Real Complaint is That the Eighth Circuit, by Holding that the Evidence Supported an Award of Punitive Damages, Misapplied a Properly Stated and Admittedly Constitutional Rule of Missouri Law?

2. The Court of Appeals' Opinion Specifically Holds That Plaintiff's Evidence Was Sufficient for the Jury to Find That the Petitioner's Stated Reasons for its Discharge of Plaintiff Were Pretextual. The Opinion Also Describes in Detail How the Evidence Proved Pretext. Should this Court Deny the Petition Based on Petitioner's False Statement That the Court of Appeals Held Evidence of Pretext is Unnecessary?

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MISSTATEMENTS IN PETITIONER'S STATEMENT OF THE CASE

This Petition for Writ of Certiorari is a plea to this Court to re-decide factual issues decided by a jury. Both the District Court and the Eighth Circuit Court of Appeals wrote lengthy opinions summarizing the evidence that supports the verdict. Petitioner's Statement of the Case ignores this evidence, instead setting forth its own evidence that obviously was rejected by the jury. As just one example, Petitioner asserts that both (1) when it placed Denesha on progressive discipline and (2) when it discharged him, it acted "in full compliance with . . . procedures." (Pet. 2, 3). This assertion is shocking, considering that the opinion of the Court of Appeals contains the following observations in that regard:

- "When Denesha complained about the salary decision, Wilfong and White treated him differently from other employees, *failing to follow various office procedures.*" (4a).

- "Evidence presented at trial indicates White also *failed to follow company procedure* in compiling the negative information." (8a, n.4).

- "Denesha was placed on progressive discipline in June 1993 *even though his performance was comparable to that of other FCRs* and despite the fact that he led the office in reduction of bodily injury ('BI') costs." (9a-10a).

- "Wilfong did ride along with other employees and testified at trial that he *consciously decided not to follow procedures* with Denesha because he did not think it would help him." (11a).

- "Nonetheless, a regional auditor observed in March of 1994 that Denesha had made 24-hour contact with claimants 100% of the time. *This finding conflicted with the claims of White and Wilfong, who characterized Denesha as consistently below the 90% goal for 24-hour contact.* These facts support the jury's conclusion that Farmers' actions were the product of discriminatory animus with respect to Denesha's age." (12a).

By misstating the evidence, Petitioner unwittingly reveals that its real complaint is not with the rules of law applied by the Court of Appeals but with the facts found by the jury.

CORRECTED STATEMENT OF THE CASE WITH CITATIONS TO THE OPINION BELOW

In November 1992 Denesha's branch claims office merged with another office and Denesha was reassigned. (3a). In 17 years as a claims representative ("CR") with Farmers prior to the merger, Denesha had never been denied a raise or formally disciplined; his last performance evaluation was "very good." (3a, 7a). In December 1992 John White, the branch claims manager for Denesha's new office, altered Denesha's salary review on the basis of irrelevant, perhaps contrived information, in order to justify denying Denesha a raise. (3a, 15a). White went beyond the review period in question in order to find examples of poor work performance to justify denial of the raise. (3a). In denying Denesha a raise, White stated that he relied in part on customer complaints against Denesha; however, the evidence showed that no such complaints had been made prior to the denial of Denesha's raise. (9a). The jury found that Farmers' denial of Denesha's raise in December 1992 was based on age discrimination, and the Court of Appeals found that the record amply supports the jury's conclusion. (7a).

In both the November and December 1992 case review meetings Denesha was told by his new supervisor, Joe Wilfong, that the younger claim representatives "were running circles around" the older ones. (9a). In the Spring of 1993 branch claim manager White himself stated that the only way to improve things would be to get rid of the "old heads" around the office. (9a).

Wilfong began recording customer complaints against Denesha in January 1993, even though younger CRs were given several warnings before any customer complaints were recorded against them. (10a-11a). Although Wilfong did so with younger CRs, he refused to perform mandatory training ride alongs with Denesha in 1993, something even manager John White testified he was "shocked" to learn. (11a). Thereafter, in June 1993, Denesha was placed on probation even though his performance was comparable to that of other CRs. (9a-10a). Despite receiving the most assignments of any CR, Denesha led the office in reduction of BI costs at the time he was put on probation. (10a). Both White and Wilfong refused to review records showing that Denesha was being treated unfairly. (10a). After placing Denesha on discipline, White and Wilfong gave him goals that were unattainable. (11a). Denesha was denied the same opportunity given to other CRs to catch up status reports. (11a).

Despite the fact that in September 1993 Denesha settled more claims than any other CR, he was demoted to office claims representative in October 1993. (11a). Denesha was fired in May 1994 for failing to meet the goal of making 24 hour contact with claimants 90% of the time, even though an audit by the Regional Office showed that he made such contact 100% of the time. (4a, 12a).

Denesha filed two separate EEOC charges while he was still employed with Farmers, one following the denial of his raise in December 1992, and one after he was placed on probation in June 1993, both of which Farmers refused to address. (22a).

Based on the foregoing evidence, the jury found that Farmers discharge of Denesha violated both the ADEA and Missouri's Human Rights Act and awarded Denesha both actual and punitive damages. (2a). After noting that under Missouri law punitive damages may only be awarded for conduct that is "outrageous because of the defendant's evil motive or reckless indifference to the rights of others" (21a), the Court of Appeals held:

> Considering the evidence in the light most favorable to Denesha, there was sufficient evidence of outrageousness to permit a reasonable juror to award punitive damages. As in *Kimzey*, management participated directly in the discriminatory conduct. *See* 107 F.3d at 575. Wilfong, Denesha's direct supervisor, on several occasions stated that the work of older employees was inferior to younger employees. Though these statements were brought to the attention of White, the office manager, he failed to take the matter seriously, instead advising Wilfong to use different language in the future. In addition, Farmers failed to address EEOC complaints filed by Denesha in January 1993 following a meeting between himself and the head of the personnel department regarding the denial of a raise and again in May 1993 after White refused to examine statistics showing that his workload was unfair, despite an audit of the statistics used by Wilfong contradicting his perception of plaintiff's performance. There was also evidence to support a determination that White and Wilfong held older employees to different

> standards than younger employees. Deliberately restricting opportunities and rewards based on age is a violation of the law. It is precisely these type of attitudes and actions that punitive damages are designed to deter. In sum, the actions of White and Wilfong permit an inference of discriminatory animus on the part of key decision makers, thus establishing the quantum of outrageousness necessary to support an award of punitive damages.

(21a-22a).

REASONS FOR DENYING THE WRIT

I.

THIS CASE INVOLVES PUNITIVE DAMAGES AWARDED UNDER MISSOURI LAW WHICH PETITIONER ADMITS MEETS DUE PROCESS STANDARDS. PETITIONER'S REAL COMPLAINT THAT THE EIGHTH CIRCUIT MISAPPLIED A PROPERLY STATED AND ADMITTEDLY CONSTITUTIONAL RULE OF MISSOURI LAW DOES NOT WARRANT REVIEW BY THIS COURT .

Petitioner's argument that the "Eighth Circuit equated a finding of intentional discrimination with a finding of outrageousness" (Pet. 5) is based on taking out of context the final sentence of the paragraph in the opinion that summarizes the evidence supporting punitive damages. The entire paragraph (reproduced above) shows clearly that the Eighth Circuit correctly applied Missouri law concerning punitive damages and did not, as petitioner claims, "equate a finding of intentional discrimination with a finding of outrageousness."

The Eighth Circuit's opinion correctly states that in order to recover punitive damages under Missouri law there

must be evidence of outrageous conduct, a standard higher than the willfulness finding that permits the recovery of liquidated damages under the ADEA:

> Under Missouri law, "'[p]unitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or reckless indifference to the rights of others.'" *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo. 1989)(en banc) (quoting *Restatement (Second) of Torts* § 908(2) (1979)). Unlike the willfulness standard for liquidated damages specified under the ADEA, *see Hazen Paper Co. v. Biggins*, 113 S.Ct. 1701 1708-10 (1993), punitive damages issue under the MHRA only upon a finding of some element of outrage.

(21a).

Thus, the language of the opinion belies Petitioner's statement that "under the Eighth Circuit's decision, intentional age discrimination by itself constitutes outrageous conduct which justifies punitive damages." (Pet. 7). To the contrary, the opinion properly notes that punitive damages under Missouri law require proof of conduct not only beyond mere intentional discrimination, but beyond that required for a finding of willfulness under the ADEA.

Petitioner's own description of Missouri law regarding punitive damages is *identical* to the above quote from the Eighth Circuit's opinion. (Pet. 6). Even more importantly, Petitioner admits that Missouri's law satisfies due process:

> *The law in Missouri concerning punitive damages comports with these Due Process standards.* Under Missouri law, the recovery of punitive damages requires a threshold showing of "actual outrageousness" that

> surpasses that required for compensatory or liquidated damages.

(Pet. 6)(Emphasis added).

Stripped of the rhetoric and misrepresentations contained in its Petition, Farmers' real complaint is that "the evidence is insufficient to establish a finding of outrageousness." (Pet. 8). This amounts to a claim the Eighth Circuit misapplied a properly stated and admittedly Constitutional rule of Missouri law by holding that there was enough evidence of outrageous conduct to permit an award of punitive damages under Missouri law. Petitioner has paid little heed to the admonishment contained in Supreme Court Rule 10 that such a complaint will rarely result in the grant of a petition for writ of certiorari.

Farmers attempts to compare this case to the pending case of *Kolstad v. American Dental Association,* 139 F.3d 958 (D.C. Cir.), *cert. granted,* ___ U.S. ___, 119 S.Ct. 401, 142 L.Ed.2d 326 (1998). *Kolstad* presents the *unsettled* question of whether punitive damages under Title VII require a finding of egregious conduct. In contrast, the Eighth Circuit's opinion in this case applies *settled* Missouri law which has long required a finding of outrageous conduct to support an award of punitive damages. Because Missouri's admittedly Constitutional standard for awarding punitive damages has long been settled, this case presents no issue in need of review.

Finally, Farmers' laments that the Eighth Circuit's holding — which simply applies well-settled Missouri law to the facts of this case, finding a reasonable juror could find Farmers' conduct outrageous — will affect "thousands of cases" and will force innocent employers "to contend with massive punitive

damage awards."[1] (Pet. 9). Such lamentations, although unfounded, were predictable. Farmers has used other such jeremiads before to try to escape liability under the ADEA. *See American Association of Retired Persons v. Farmers Group, Inc.*, 943 F.2d 996, 1007 (9th Cir. 1991), where the court stated:

> Over the many years since the ADEA was first enacted, Farmers has been resolute in its opposition to the policies and purposes that animated that legislation. It embraced every opportunity to restrict benefits for older workers and ultimately went too far. As a result, it violated the ADEA by depriving older workers of the benefits to which they would otherwise have been entitled and by doing so for the purpose of driving them into retirement. Therefore, *despite Farmers' jeremiads and febrile arguments* it must now make the individual appellees whole.

(Emphasis added).

This Court should deny the petition so that Farmers will likewise have to make whole the plaintiff here who was similarly damaged by Farmers' opposition to the policies and purposes that animated legislation against age discrimination.

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[1] Farmers also claims that Missouri's standard for punitive damages means that "every age discrimination verdict would include an award of punitive damages." (Pet. 7). However, Farmers does not explain why Missouri law would apply to "every" age discrimination claim nor why claimants would be "automatically entitle[d]" to punitive damages regardless of whether the factfinder awards them.

II.

THE COURT OF APPEALS' OPINION HOLDS THAT PLAINTIFF'S EVIDENCE WAS SUFFICIENT FOR THE JURY TO FIND THAT THE PETITIONER'S STATED REASONS FOR ITS DISCHARGE OF PLAINTIFF WERE PRETEXTUAL. THE OPINION ALSO SETS FORTH HOW THE EVIDENCE PROVED PRETEXT. THIS COURT SHOULD DENY THE PETITION BASED ON PETITIONER'S FALSE CHARACTERIZATION OF THE COURT OF APPEALS HOLDING.

The second issue Petitioner claims justifies review is an alleged holding by the Eighth Circuit that "the employee did not have to rebut the employer's proffered reason for discharging the employee." (Point II, Pet. 10). The Eighth Circuit's opinion contains no such holding. To the contrary, the opinion affirmatively holds that "the record amply supports the jury's conclusion that the offered reasons were merely a pretext for underlying age discrimination" (7a). Additionally, the opinion specifically describes *how* the evidence showed that petitioner's stated reason for his discharge was pretextual:

> Nonetheless, a regional auditor observed in March of 1994 that Denesha had made 24-hour contact with claimants 100% of the time. This finding conflicted with the claims of White and Wilfong, who characterized Denesha as consistently below the required 90% goal for 24-hour contact. These facts support the jury's conclusion that Farmers' actions were the product of discriminatory animus with respect to Denesha's age.

(12a). Petitioner mischaracterizes the opinion out of an apparent recognition that under any fair reading of the opinion, this case presents no issue worthy of review.

Point II of the Petition simply repeats Farmers' silly but nonetheless oft-stated and uniformly rejected argument that because Farmers, as a part of an ongoing pattern of discrimination, demoted Denesha from field claim representative ("FCR") to office claims representative ("OCR") in October 1993, both courts below were required to ignore overwhelming evidence that the same two supervisors consistently discriminated against Denesha on the basis of his age from the time of the merger in November 1992 until the demotion in October 1993.[2] No case so holds, again explaining why Farmers feels compelled to mischaracterize the Eighth Circuit's holding in its attempt to gain an audience before this Court.

Because the opinion of the Eighth Circuit does not hold — or even imply — that a discrimination plaintiff need not prove that an employer's stated reason for discharging him is pretextual, Farmers' claimed fear that "lower courts will be inundated with litigation unrelated to the specific reasons for an employer's action" is simply another unfounded jeremiad. *See* p. 8, *supra.*

CONCLUSION

This Court should deny the Petition for Writ of Certiorari.

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[2] Included in the evidence that Farmers contends the jury could not consider on the discharge claim was the fact that in December 1992 Farmers denied Denesha a raise. The jury found the denial of a raise was due to age discrimination, a finding Farmers does not even challenge. Farmers simply omits any reference to this separate verdict from its petition.

Respectfully submitted,

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